IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 73-1653

ROY W. ENSLOW,
Petitioner,

vs.

ARTHUR JEROME WATSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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IN THE

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No.

ROY W. ENSLOW,
Petitioner.

vs.

ARTHUR JEROME WATSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

Petitioner, the Sheriff of Fremont County, Colorado, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado entered in the above-entitled matter on January 14, 1974.

OPINION BELOW

The opinion of the Supreme Court of the State of Colorado remanding the cause to the District Court with orders to make the writ of habeas corpus absolute is set out in Appendix B and is reported as *Watson* v. *Enslow* (1974) ____ Colo. ____, 517 P.2d 1346. The order denying a rehearing is set out in Appendix C.

JURISDICTION

The opinion of the Supreme Court of the State of Colorado issued on January 14, 1974. Petitioner's timely application for rehearing was denied on February 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and Rule 22 of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Whether under the facts of this case the Governor of the State of Colorado lacked authority to issue the warrant of arrest and rendition which this petitioner was ordered to execute because the Governor of Colorado previously failed to fulfill his promise to the Governor of California to return Arthur Jerome Watson to that State after completion of prosecution in the State of Colorado.

STATUTES INVOLVED

The constitutional and statutory provisions involved are set forth in Appendix A. They are:

Colorado Revised Statutes 1963, 60-1-5

United States Code, 18 U.S.C. § 3182.

United States Constitution, Article IV, Section 2, Clause 2

STATEMENT

HISTORY OF THE CASE

In 1956, Arthur Jerome Watson was serving a California prison sentence for Robbery in the first degree with four prior felony convictions. In November of

that year, he escaped and was involved in a murder in the State of Colorado. In January of 1957, before being apprehended by Colorado authorities, he was returned to California where he was convicted on new charges of robbery in the first degree and escape. Later in 1957, he was extradited to Colorado to face prosecution on the murder charge. This extradition was accomplished pursuant to a requisition by the Governor of Colorado as supplemented by an agreement by the Colorado Governor to return Mr. Watson to California at the expense of the State of Colorado after completion of the Colorado prosecution, provided that the death penalty was not imposed.

Following Mr. Watson's transfer to the State of Colorado, he was convicted of murder in the first degree and was sentenced to death. This conviction was reversed by the Colorado Supreme Court in 1960 and the cause was remanded for retrial. That case is reported as *Kostal* v. *People* (1960) 144 Colo. 505, 357 P.2d 70. On retrial, Mr. Watson was again convicted and was sentenced to life imprisonment. This conviction was affirmed in 1964 in a decision reported as *Watson* v. *People* (1964) 155 Colo. 357, 394 P.2d 737. Mr. Watson was not returned to the State of California at this time. Subsequently, in 1972, the Governor of Colorado commuted Mr. Watson's sentence to a term of twenty-three years to life and Mr. Watson was paroled to a California detainer. Later in 1972, the Governor of California formally demanded Mr. Watson's return to California. Pursuant to that de-

mand, the Colorado Governor issued a warrant of arrest and rendition and ordered your petitioner to deliver custody of Mr. Watson to a designated California agent.

Thereafter, Mr. Watson filed a petition for habeas corpus seeking release from custody under the Governor's warrant. On January 14, 1974, the Colorado Supreme Court granted Mr. Watson the relief prayed for and remanded the cause to the District Court with orders to make the writ absolute. Petitioner's application for a rehearing was denied on February 4, 1974.

REASON FOR GRANTING THE WRIT

Colorado Revised Statutes 1963, 60-1-5 Does Not And Cannot Limit The Authority Of The Governor To Honor The Demand Of The Governor Of California For The Arrest And Rendition Of A Fugitive From The Justice Of That State.

It is the petitioner's contention that the Supreme Court of the State of Colorado has interpreted Colorado Revised Statutes 1963, 60-1-5 in a way that is inconsistent with the United States Constitution and relevant federal statutes implementing those Constitutional provisions, and that the opinion has a direct, adverse and improper effect on the relations between States.

Under Colorado Revised Statutes 1963, 60-1-5. (Appendix A) the Governor of Colorado is authorized to enter into an executive agreement with the Governor of another state in order to secure the presence for trial of a fugitive from the justice of Colorado who is imprisoned in the asylum state. Under that section, the Governor is authorized to promise as a condition

of extradition, that the fugitive will be returned to the asylum state at the expense of the State of Colorado as soon as the prosecution in Colorado has been completed.

In the present case, the Governor of Colorado made such a promise to the Governor of California in order to accomplish the rendition to Colorado of Arthur Jerome Watson, a California prisoner serving consecutive sentences for robbery in the first degree and escape. The specific and pertinent language of that promise is as follows:

> "IT IS HEREBY AGREED by the undersigned, Governor of the State of Colorado, that in the event said Arthur Jerome Watson . . . shall be acquitted or shall receive a sentence of less than death following a trial in the courts of the State of Colorado, or the prosecution in the State of Colorado is otherwise terminated, said Arthur Jerome Watson . . . will be returned to the State of California at the expense of the State of Colorado, and that the Governor, or other acting executive authority of this state, will upon demand of the executive authority of the State of California surrender said Arthur Jerome Watson . . . to the duly authorized agents of the State of California." (Exhibit B at p.2).

Notwithstanding the above promise, when prosecution in Colorado was completed in 1964 with the imposition of a life sentence, the fugitive was not returned to the State of California. Subsequently in 1972, the State of California through its Governor, made a formal demand upon the Governor of Colo-

rado for the return of Arthur Jerome Watson to complete his California sentences. However, when the warrant issued pursuant to that demand was challenged in a petition for habeas corpus, the Colorado Supreme Court held that the failure of the Colorado Governor to fulfill his promise under the executive agreement now deprives him of authority to issue the warrant. The Court did not provide that anyone else in the State of Colorado had that authority nor did it indicate under what conditions the Governor's authority might be revived.

It is generally recognized that the interstate extradition of criminals is controlled by federal law since it is provided for directly in the United States Constitution, Article IV, Section 2, and by the implementing legislation, 18 U.S.C. Section 3182, (Appendix A) and while the States may allow extradition on terms less exacting than those provided by federal law, they cannot place limitations on the Constitutional duty of a Governor to honor the demand for extradition by a sister state. See *Smith* v. *Idaho* (1967) 373 Fd.2d 149; *Walden* v. *Mosley* (1970) 312 F.Supp. 855, 859; *In re Morgan* (1966) 244 Cal.App.2d 903; *Matochik* v. *Baker* (1953) 306 N.Y. 32; *Ex Parte Riccardi* (1949) 68 Ariz. 180; *Bishop* v. *Jones* (1949) 207 Miss 423; *Spiah* v. *Seay* (1946) 185 Va. 710; *State* v. *Parrish* (1941) 242 Ala. 7; *LaRue* v. *Meyering* (1934) 357 Ill. 166.

Article IV, Section 2, Clause 2 (Exhibit A) of the United States Constitution provides:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

As this Court noted in *Appleyard* v. *Massachusetts* (1906) 203 U.S. 222, 227:

> "The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States—an object of the first concern to the people of the entire country, and which each State is bound, in fidelity to the Constitution, to recognize."

When a demand is made upon the Governor of a State, it becomes the duty of that Governor to cause the fugitive to be arrested and surrendered to the demanding State. *McNichols* v. *Pease* (1907) 207 U.S. 100, 108. As noted by the California Supreme Court many years ago:

> "Upon this very subject of the surrender of fugitives from justice fleeing from one State or nation to another, under the rules of international law, it has been a question very fully and ably discussed by public writers, whether such surrender was a matter of right and duty, or merely of comity. (Story on Conflict of Laws, Secs. 626–628). This was deemed too important a question to leave unsettled, and the framers of our National

> Constitution wisely inserted the clause referred to, making it no longer a matter of mere comity, subject to the pleasure of each State, but an absolute right and duty."

In Matter of Romaine (1863) 23 Cal. 585, 589–590; See also *Kentucky* v. *Dennison* (1860) 65 U.S. 66, 76; *Biddinger* v. *Commissioner* (1917) 245 U.S. 128.

Thus, the United States Constitution not only provides for the authority to participate in extradition proceedings (Cf. *Ex Parte Morgan* (1883) 20 Fd. 98) but, more importantly, it defines and renders absolute the rights and obligations of states which are party to the Union. In a very real sense, the duty of a Governor to render up fugitives upon demand is a condition of Statehood. The opinion of the Colorado Supreme Court thus has the effect of allowing the Governor of this State or any state having similar statutory provisions[1] to unilaterally discharge that condition of statehood and to frustrate and defeat its concomitant rights and obligations. Stated another way, the Colorado Supreme Court has provided that a state statute, in this case Colorado Revised Statutes 1963, 60-1-5, can effectively place limitations and conditions upon the authority of a Governor in extradition proceedings beyond those imposed in the United States Constitution or Federal Statutes.[2] This is

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[1] The provision concerning the authority of a Governor to enter into an executive agreement is a part of the Uniform Criminal Extradition Act and has been adopted by most states.

[2] At page 5 of the Court's opinion (Appendix B), the Court stated: "As we view this statute and its predecessor, C.R.S. '53, 60-1-5, which was identical in every respect, it is both a grant *and limitation* of executive authority." (Emphasis added.)

clearly contrary to the well recognized principles outlined above, and petitioner submits that it is detrimental to the preservation of the Union.

Finally, it is important to a proper consideration of this petition to note that the decision of the Colorado Supreme Court rests wholly on its finding that the Governor lacked authority to honor California's demand. The matter of a Governor's "discretion" to reject a demand for extradition was not in issue, nor was there any question concerning the validity of the demand itself. Cf. *Kentucky* v. *Dennison, supra.*

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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State of Colorado

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EXHIBIT A

EXHIBIT A

Colorado Revised Statutes 1963, 60-1-5

60-1-5. Extradition of persons imprisoned or awaiting trial.—(1) When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

(2) The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in section 60-1-23 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

UNITED STATES CONSTITUTION,
ARTICLE IV, Section 2, Clause 2

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

UNITED STATES CODE
18 U.S.C. § 3182

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of arrest, the prisoner may be discharged."

EXHIBIT B

No. 25750

ARTHUR JEROME WATSON,
Petitioner-Appellant,

v.

ROY W. ENSLOW, *Sheriff,*
Fremont County, Colorado,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE COUNTY OF FREMONT

En Banc

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

Honorable Howard E. Purdy, Judge

Rollie R. Rogers
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J. D. MacFarlane
Chief Deputy State Public Defender
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MR. JUSTICE DAY delivered the opinion of the Court.

This is an appeal from the denial of petitioner Watson's request for habeas corpus, C.R.S. 1963, 60-1-10.

The matter arises because of an extradition request by the State of California. The facts are as follows: Petitioner Watson was serving a California prison sentence in 1957. He escaped to Colorado and was involved in a murder. He returned to California before being apprehended by Colorado authorities and was reincarcerated in the California prison. In late 1957, petitioner was extradited to Colorado from California to stand trial for the murder charge. That extradition was accomplished through an executive agreement between the Governors of California and Colorado. The agreement provided in pertinent part:

> "IT IS HEREBY AGREED by the undersigned, Governor of the State of Colorado, that *in the event said Arthur Jerome Watson * * * shall be acquitted or shall receive a sentence of less than death following a trial in the courts of the State of Colorado,* or the prosecution in the State of Colorado is otherwise terminated, said Arthur Jerome Watson * * * *will be returned to the State of California* at the expense of the State of Colorado, and that the Governor, or other acting executive authority of this state, *will upon demand of the executive authority of the State of California surrender* said Arthur Jerome Watson * * * to the duly authorized agents of the State of California." (Emphasis added.)

Upon the completion of his extradition to Colorado, petitioner was tried on a charge of first-degree murder. He was convicted. We reversed that conviction and remanded the case for retrial. *Kostal v. People*, 144 Colo. 505, 357 P.2d 70 (1960). On retrial,

petitioner was again convicted and sentenced to life imprisonment. We affirmed. *Watson v. People*, 155 Colo. 357, 394 P.2d 737 (1964). This sentence of "straight life" was subsequently commuted to 23 years to life and parole was granted in 1972. Petitioner's parole was abruptly interrupted by an extradition request from California. It was filed more than eight years after petitioner's Colorado appellate proceedings were terminated, and alleged that petitioner was a fugitive from justice in California whose return was mandated by § 2 of the Uniform Criminal Extradition Act, C.R.S. 1963, 60-1-2. The Governor of this state issued a warrant for petitioner's arrest, C.R.S. 1963, 60-1-7, and petitioner was taken into custody by the respondent, Sheriff of Fremont County. Petitioner sought habeas corpus relief, C.R.S. 1963, 60-1-10, in the district court. It was denied after a full hearing and petitioner appealed to this court. We reverse the district court, make the writ absolute and order that petitioner be discharged.

I.

At the outset, it is important to note that, despite the fact that California's request for extradition invokes § 2 of the Uniform Criminal Extradition Act, C.R.S. 1963, 60-1-2, this case involves an executive agreement between two states, and is therefore controlled by § 5 of the Uniform Criminal Extradition Act, C.R.S. 1963, 60-1-5. Section 5 was specifically designed to deal with the problem of extraditing and returning those prisoners who are already in the custody of the authorities of another state by reason of imprisonment or awaiting trial. Commissioner's Note, § 5 *Uniform Criminal Extradition Act*, 9 U.L.A. 296 (1957); *cf. In Re Whittington*, 34 Cal. App. 344.

167 P. 404 (1917). We note further that we limit our opinion in this case to an interpretation of the authority of our executive under our statutes, and intimate no view regarding the scope of the authority of the executive of our sister state of California.

II.

Petitioner's removal from California as well as his present extradition to California from this state are governed by § 5 of the Uniform Criminal Extradition Act, C.R.S. 1963, 60-1-5:

> "*Extradition of persons imprisoned or awaiting trial.*—(1) When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, *the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.*
>
> "(2) The governor of this state may also *surrender on demand* of the executive authority of any other state any person in this state who is charged in the manner provided in section 60-1-23 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily." (Emphasis added.)

The executive agreement which brought petitioner to Colorado in the first instance was authorized by the

quoted section of the statute. That agreement, of course, set forth the course of conduct for both parties. The statute, however, sets forth the course of conduct which the Colorado governor must follow. As we view this statute and its predecessor, C.R.S. '53, 60-1-5, which was identical in every respect, it is both a grant and limitation of executive authority. The governor of this State was authorized to enter into the executive agreement with California for the return of petitioner Watson, C.R.S. 1963, 60-1-5(1). His surrender could be made to that state, *id.* (2). This grant of authority is addressed to the governor's discretion, for it is couched in language which is permissive not mandatory. *Thompson v. Bannan,* 298 F.2d 611 (6th Cir. 1962). Once having exercised that discretion, however, the power and duties of the Colorado executive are governed by the terms of the statute. As is evident from a reading of the statute, the power of the governor to make surrender and return is limited by that portion of the statute which reads: "upon condition that such person be returned to such other state * * * as soon as the prosecution in this state is terminated."

As the recitation of the facts reveals, the surrender to the executive in California which the statute contemplates was not made at the time petitioner's Colorado proceedings were terminated, *Watson v. People,* 155 Colo. 357, 394 P.2d 737 (1964), but rather, eight years after that time. We are presented, therefore, with the narrow issue of whether, where an executive agreement based on C.R.S. 1963, 60-1-5 has been made, the failure to return Watson according to the terms of the statute limits the authority of our executive to make surrender at a later date. We answer the question in the affirmative.

III.

The question presented by petitioner is a novel one. The cases cited by the People in their brief rebut the doctrine of waiver as applied to the situation here. The only applicable case which the petitioner cites holds that, when the governor of the state of origin does not make timely demand, that state has waived its jurisdiction. *People ex rel. O'Connor* v. *Bensinger*, ------ Ill.2d ------, 270 N.E.2d 1 (1971). These cases are of little assistance. As we view this issue, the controlling principles apply only to the acts of the Colorado governor, and not to the question of jurisdiction or waiver of the State of California.

IV.

The legislative history of the clause requiring that return be made "as soon as the prosecution in this state is terminated" provides no guidance on the meaning and purposes of the clause. *Uniform Criminal Extradition Act* § 5, 9 U.L.A. 295–96 (1957). Nevertheless, we are called upon to decide the issue.

As we view the section under scrutiny, it is meant to serve several purposes for both the interests of the government and the constitutional rights of the defendant. Firstly, the provision placing the expense on Colorado of returning the prisoner to the state from which he has been taken is in lieu of the savings in cost for the prisoner's retention in this state and guarantees that these costs are kept to a minimum. This is an affirmative duty that the legislature has imposed in the executive. See also C.R.S. 1963, 60-1-12. Secondly, the clause is clearly intended to provide a standard to the state of origin, informing that state as to the proper time for demand. The statute also

makes it obvious that the executive could not make return before the prosecution proceedings are terminated. Thirdly, therefore, the clause gives the governor of Colorado a standard for determining when a demand for return is both timely and proper. *Cf.* C.R.S. 1963, 60-1-4. These are the governmental interests which are furthered by the statute.

The protection of prisoner interests is discernible from the holdings of some federal courts as well as a common sense consideration of the impact of "passing around" prisoners from one jurisdiction to another, *e.g., Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967). Prisoners who have been extradited from states where they are already imprisoned incur an interruption of the service of their sentences. As the court said in *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930), such prisoner should not be required to serve his sentence piece-meal. His return as speedily as the completion of proceedings will permit, on the other hand, may be necessary to enable him to pursue any post-conviction remedies which were interrupted or suspended by his extradition to this state. Then again, he may be able to secure credit from Colorado for the time he serves in the prison system of the state of origin. *See Alire v. People*, 171 Colo. 228, 466 P.2d 78 (1970).

On the facts revealed by petitioner's counsel—not disputed by the People—the effect of the failure to return this petitioner to California when his Colorado proceedings were terminated illustrates how disregard for the mandate of this section can have serious consequences. Petitioner's appeal of his California conviction on which he was being held was dismissed for failure to pursue it to completion. Also, while Colorado would perhaps be willing to give this petitioner credit

against his Colorado sentence for the time he would have served in California had he been promptly returned (*See Alire v. People, supra*), California does not allow credit for the eight years he has served in this state. *In Re Gullatt*, 69 Cal.2d 395, 445 P.2d 292, 71 Cal. Rptr. 676 (1968).

The legal authority of Colorado's governor to make the requested surrender and return at this late date is beyond the authority provided both in the statute and the agreement. The arrest warrant being without the governor's authority, it follows that the respondent, Sheriff of Fremont County, has no legal authority to hold petitioner.

The judgment of the district court is reversed. The cause is remanded to said court to make the writ of habeas corpus absolute and to release the petitioner.

MR. CHIEF JUSTICE PRINGLE does not participate.

EXHIBIT C

CLERK'S OFFICE

SUPREME COURT

STATE OF COLORADO

DENVER 80203

February 4, 1974

Case No. 25750

Watson

v.

Enslow

The Honorable John P. Moore,
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Mr. John E. Bush,
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Mr. Tennyson W. Grebenar,
Asst. Attorney General,
State Capitol,
Denver, Colorado. 80203.

Mr. Rollie R. Rogers,
Public Defender,
Mr. Lee Belstock,
Deputy Public Defender,
1575 Sherman Street,
Denver, Colorado. 80203.

Gentlemen:

The following proceedings were this day had by the court today:

The petition for rehearing was denied.
Remittitur issued.

Yours very truly,
RICHARD D. TURELLI, *Clerk.*
By FLORENCE WALSH
Deputy Clerk